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ADMINISTRATIVE LAW

by

David M. Guinn*

DURING the past year, Texas appellate courts continued to resolve questions of administrative law which fall within the three primary classifications adopted for the previous *Surveys*.¹ These classifications include constitutional considerations, administrative adjudications and judicial review. A substantial amount of the litigation dealt with the various subdivisions under judicial review; specifically, the scope of review on appeal, statutory interpretation and substantial evidence.

In light of Justice Reavley's timely remarks in a recent issue of the *Southwestern Law Journal*,² it is noteworthy that after several months of careful study, the Administrative Law Committee of the State Bar has completed the drafting of an Administrative Procedure Act for Texas. This proposed Act will be submitted to the legislature for consideration within the next year. It should be noted that the rules established by some of the cases discussed in this Article will be affected if the proposed legislation is enacted.

I. CONSTITUTIONAL CONSIDERATIONS

Adequacy of Notice and Hearing. Private associations are free to remove their members for failure to abide by rules and regulations of the association. However, due process requires that the proceedings for disciplinary action established by the association must be followed.³ In a recent case appellee was a member of the Houston chapter of the American Institute of Real Estate Appraisers. In 1963 he testified in a condemnation suit in which the city of Houston was a party.⁴ The testimony given, which was elicited by the landowner, was considered by several members of the association to be deceptive and partisan. These members promptly brought disciplinary proceedings against appellee, pursuant to a rather elaborate set of rules and regulations of the Institute governing such matters.⁵

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¹ FitzGerald, *Administrative Law, Annual Survey of Texas Law*, 23 Sw. L.J. 212 (1969); *id.*, 22 Sw. L.J. 223 (1968).

² Reavley, *Substantial Evidence and Insubstantial Review in Texas*, 23 Sw. L.J. 239, 250-51 (1969).

³ *American Inst. of Real Estate Appraisers v. Hawk*, 436 S.W.2d 359 (Tex. Civ. App.—Houston 1968).

⁴ See *Houston v. Biggers*, 380 S.W.2d 700 (Tex. Civ. App.—Houston 1964), *error ref. n.r.e.*, *cert. denied*, 380 U.S. 962 (1965), for the ultimate disposition of the case.

⁵ The rules and regulations of the Institute provided for a "Chapter Committee," to be established by the local chapter. That Chapter Committee may hold hearings of a disciplinary nature on its own motion. If it does, it must comply with the notice procedure as set forth in the Institute's regulation 6, section 6.81. The Chapter Committee may also hold a hearing pursuant to a complaint by an individual. In this circumstance, the notice provision is as follows:

6.82 Prior to a formal hearing on a complaint in writing by other than the Committee, the Committee shall in writing, by registered mail bearing a postmarked date at least 20 days prior to the date set for hearing, notify the accused Member of the filing of the complaint, enclosing a copy thereof, of the time and place for hearing,

Appellee received two notices concerning the disciplinary action. One dated August 3, 1967, was not signed as required by rule 6.82.⁶ The second was issued November 24, 1967, but was not accompanied by a complaint.⁷ A hearing was finally held on January 5, 1968, after which the local chapter recommended that appellee be suspended from membership for 120 days. Subsequent to this recommendation, the Governing Council of the Institute entered an order suspending appellee for a period of one year. Appellee challenged the order by filing suit in a Harris County district court seeking a temporary injunction against enforcement of the order, alleging that the Institute and its agencies did not follow their own rules for disciplinary hearings. A judgment was entered in favor of appellee and the Institute appealed.

The court of civil appeals pointed out that since the judgment under review was for a *temporary* injunction, the appellee need only have established that he had a *probable right* and was threatened with a *probable injury* in order to obtain the injunction. The court observed that private associations can regulate their members by establishing rules and regulations and are not held to the same niceties of procedure as are applied in civil courts. However, members of such associations may not be deprived of due process in disciplinary proceedings.

This case is important in two respects. First, it evidences the growing

and of the Articles of the Code of Ethics, By-laws, and/or Regulations he is alleged to have violated, and inform him that he must file an answer with the Committee, serving a copy thereof on the complainant, at least 10 days prior to the hearing date.

RULES AND REGULATIONS OF THE AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS § 6.82 (1965). Regulation 6, section 6.62 provides that "Any written complaint filed shall set out the conduct complained of and be subscribed by the complainant." *Id.* § 6.62 (1965).

The Chapter Committee may, after a hearing, admonish or reprimand a member, but it is not authorized to suspend or expel him. If the Chapter Committee concludes that the member should be either suspended or expelled, it sends its files to the National Committee. The National Committee is also not authorized to suspend or expel, but must forward the file to the Governing Council of the Institute if it believes suspension or expulsion is justified. The Governing Council is the *only* entity authorized to inflict such a punishment.

⁶ The notice of that date included this language: "This hearing will be held pursuant to a complaint in writing pursuant to paragraph 6.82 of Regulation No. 6. A true and exact copy of the complaint is enclosed." 436 S.W.2d at 361-62.

⁷ This notice came in the form of a letter from the chairman of the local ethics committee to Hawk, which provided as follows:

Dear Mr. Hawk:

In conformance with the committee's decision at the hearing on November 2, 1967, the charges are being reduced to writing. Several questions have arisen as to whether your appraisal and subsequent testimony were based on sound appraisal techniques or were perhaps the result of advocacy. The committee will ask questions concerning your appraisal and testimony with regard to the reasoning behind your statements. You will be asked questions with respect to the following:

1. The failure to mention that 25,000 plus square feet of the subject property was subject to flowage easement.
2. The failure to adjust sales of great variance to the subject when they were used as comparables, and whether they were, in fact, comparable.
3. The failure to give dimensions and other pertinent data of sales. (Comparable?)
4. The failure to compare sales to subject.
5. The possibility that advocacy may have led to finding a higher value than that justified by the market.

The hearing will reconvene on January 5, 1968, at 9:00 a.m. at the Houston Board of Realtors office, 401 West Alabama.

Let me know if you desire further information.

Yours very truly,
/s/ Charles L. Osenbaugh

concern of the judiciary that fundamental procedural fairness must be afforded parties in *all* types of hearings, whether governmental or private, in which a party may suffer irreparable harm. Second, in challenging a disciplinary proceeding by means of a temporary injunction, the litigant need only show that he possessed a probable right and was threatened with probable injury. Texas courts for many years have predicated the availability of judicial review of administrative action upon the question of whether a vested property right is adversely affected.⁸ The Houston court of civil appeals appears to be using a more realistic approach. While the court did not go so far as to say that "any party aggrieved has standing," still "probable right and probable injury" is substantially different from "vested property rights adversely affected in fact."⁹

Reasonableness of Police Power Regulations. In a case of first impression in Texas, the Houston court of civil appeals held that an untrained layman who sold will forms was engaged in the practice of law and therefore subject to the statute prohibiting an unlicensed person from engaging in such practice.¹⁰ A suit had been filed by the State Bar of Texas and the Houston Bar Association to enjoin the defendant from advertising and selling will forms containing blanks to be filled in by the user. The action was grounded on the contention that the defendant, by selling such forms, was engaged in the practice of law in violation of a Texas statute.¹¹

The defendant, besides contending that selling will forms did not constitute practicing law, argued that the injunction violated his constitutional rights of speech, publication and contract. The Houston court of civil appeals held that since the drafting of a will is a difficult and intricate procedure in many cases, selling will forms was engaging in the practice of law. In answer to defendant's constitutional contentions, the court stated:

The above statute was enacted in the interest of public welfare and safety for the purpose of prohibiting the practice of law by unqualified and unlicensed persons under the State's police power. Constitutional guarantees of freedom of expression and of contract must yield to permit the rendition of such decree as is necessary for the reasonable protection of the public.¹²

Thus, the court encountered no difficulty in applying a balancing test between reasonable police regulation and fundamental constitutional rights in this case.¹³

⁸ See, e.g., *Board of Firemen's Relief v. Hamilton*, 386 S.W.2d 754 (Tex. 1965).

⁹ For a thorough discussion of the problem of standing to appeal from an administrative order in state courts, see 2 F. COOPER, *STATE ADMINISTRATIVE LAW* 535-59 (1965).

¹⁰ *Palmer v. Unauthorized Practice Comm. of the State Bar*, 438 S.W.2d 374 (Tex. Civ. App.—Houston 1969).

¹¹ TEX. REV. CIV. STAT. ANN. art. 320(a)-1, § 3 (1959), provides:

All persons who are now or who shall hereafter be licensed to practice law in this State shall constitute and be members of the State Bar, and shall be subject to the provisions hereof and the rules adopted by the Supreme Court of Texas; and *all persons not members of the State Bar are hereby prohibited from practicing law in this State.*

(Emphasis added.)

¹² 438 S.W.2d at 376-77.

¹³ See *Gitlow v. New York*, 268 U.S. 652 (1925), for an interesting decision applying the bal-

II. ADMINISTRATIVE ADJUDICATION

Administrative Procedure. A Texas statute establishes a time limit on appeals from orders of the State Board of Dental Examiners.¹⁴ In a recent decision, the Houston court of civil appeals held that the statute is jurisdictional and may not be waived by the Board.¹⁵ The Board of Dental Examiners had given notice to a dentist that he was charged with violating several provisions of the statute governing professional responsibility,¹⁶ and that a hearing would be held on September 25, 1965. On January 22, 1966, the Board entered an order suspending the dentist's license for a period of one year, the suspension to commence on March 15, 1966, and to terminate on March 14, 1967. On March 14, 1966, at the doctor's request, the suspension was delayed for one month until April 15, 1966. On April 13, 1966, the dentist filed suit in an appropriate district court and was successful in having the order set aside.

On appeal, the Board contended that the district court was without jurisdiction since the doctor had not appealed within thirty days from the date the order was issued. The court of civil appeals agreed, holding that the Board's order had already become final when the time extension was granted. Under the wording of the statute, it was necessary that any appeal from a decision of the Board be made by February 21, 1966. After that date the district court had no jurisdiction to hear an appeal. The court also concluded that "the Board had no authority to extend or enlarge the statutory time set by the Legislature in which an individual, such as appellee, had to appeal from an order suspending or revoking his license."¹⁷

Standing To Appeal. The Houston court of civil appeals recently held that

ancing test. The question of selling will forms has been passed on in several jurisdictions with varying results. *Grievance Comm. v. Dacey*, 154 Conn. 129, 222 A.2d 339 (1966); *New York County Lawyers' Ass'n v. Dacey*, 28 App. Div. 2d 161, 283 N.Y.S.2d 984 (1967), *rev'd and dissenting opinion adopted*, 21 N.Y.2d 694, 234 N.E.2d 459, 287 N.Y.S.2d 422 (1967); *Shortz v. Yetter*, 38 Pa. D. & C. 91 (C.P. Luzerne County 1940).

¹⁴ TEX. REV. CIV. STAT. ANN. art. 4549 (1960), which provides in part:

If said Board shall make and enter any order revoking or suspending any license or licenses as hereinabove provided, the person or persons whose license shall have been so revoked or suspended may, *within thirty (30) days after the making and entering of such order*, take an appeal to the District Court of the County of the residence of the person or persons whose license shall have been so revoked or suspended, by filing an appropriate petition for such purpose.

(Emphasis added.)

¹⁵ *Texas State Bd. of Dental Examiners v. Blankfield*, 433 S.W.2d 179 (Tex. Civ. App.—Houston 1968), *error ref. n.r.e.*

¹⁶ Specifically, Dr. Blankfield was charged with violating TEX. REV. CIV. STAT. ANN. art. 4549 (1960). It provides in part:

The Texas State Board of Dental Examiners and the District Courts of this State shall have concurrent jurisdiction and authority, after notice and hearing as herein-after provided, to suspend or revoke a dental license for any one or more of the following causes:

(c) That the holder thereof has been or is guilty of dishonorable conduct, malpractice or gross incompetency in the practice of dentistry.

(d) That the holder thereof has been or is guilty of any deception or misrepresentation for the purpose of soliciting or obtaining patronage.

(h) That the holder thereof has failed to use proper diligence in the conduct of his practice or to safeguard his patients against avoidable infections.

¹⁷ 433 S.W.2d at 182.

since the holder of a taxicab permit possesses only a privilege, not a vested right, he does not have standing, absent a special statute, to contest the granting of additional permits by an administrative body.¹⁸

The Director of Public Service of Houston conducted a hearing on the application of a cab company for two hundred additional taxicab permits. The appellant and others appeared and unsuccessfully contested the application. The contestants attempted to appeal to the city council but were denied a hearing, and later filed suit in a district court seeking temporary and permanent injunctions against the issuance of the licences. The applicable city ordinance contained no provision allowing an appeal from the decision of the Director of Public Service, either to the city council or the courts, by one *contesting* a successful application. However, if an application is denied, the *applicant* may appeal to the city council.¹⁹

The court of civil appeals stated as the governing principle of law that the ruling of an administrative body is not subject to judicial review where there is no statutory provision for appeal, unless the ruling affects vested property rights or violates some constitutional provision.²⁰ The individual who possesses a taxicab license holds only a privilege, not a vested property right. Thus, the appellant had no standing to attack the order.

The principles stated in the decision are fairly easy to understand and in substance are a reiteration of the doctrine established by the Supreme Court of Texas in *City of Amarillo v. Hancock*.²¹ The problem is one of determining when a "vested property" right or constitutional right is involved. All too frequently, the courts rely upon the old right-privilege dichotomy, developed over the years for reasons no longer considered sound. The use of the highways has been designated a "privilege;" consequently, no judicial review is available in the absence of a statute.²² Yet as a practical matter, the loss of a license or permit to use the streets and highways for commercial purposes may result in substantial financial loss. Such a license may in fact be of greater value than some of the so-called "vested property" rights.

III. JUDICIAL REVIEW

Statutory Interpretation. The survey period produced several interesting decisions involving the interpretation of various statutes applied by ad-

¹⁸ *White Top Cab Co. v. City of Houston*, 440 S.W.2d 732 (Tex. Civ. App.—Houston 1969). Contrast several Texas decisions wherein existing franchise holders were permitted to attack the granting of additional franchises to third parties. *Oil Field Haulers Ass'n v. Railroad Comm'n*, 381 S.W.2d 183 (Tex. 1964); *Brazosport Sav. & Loan Ass'n v. American Sav. & Loan Ass'n*, 161 Tex. 543, 342 S.W.2d 747 (1961).

¹⁹ The ordinance of the City of Houston relating to taxicab permits is HOUSTON, TEX., ORDINANCES ch. 39, art. II (1960). That article makes it unlawful to operate a taxicab on the streets of the city without a permit and provides a fine for any such unlawful operation. It specifies the procedure to be followed in applying for permits and in conducting the hearing thereon. At paragraph (e) it provides: "After the Director has made his findings and in the event the application has been denied, the applicant shall have the right to appeal to the City Council."

²⁰ 440 S.W.2d at 734.

²¹ 150 Tex. 231, 239 S.W.2d 788 (1951).

²² *Ex parte Sterling*, 122 Tex. 108, 53 S.W.2d 294 (1932). The same holds true of a beer license. *Texas Liquor Control Bd. v. Falstaff Distributing Co.*, 369 S.W.2d 483 (Tex. Civ. App.—Houston 1963).

ministrative agencies. While results in the cases varied, in none of the opinions did the courts place any considered emphasis upon the agency analysis, statutory interpretation being a question of law upon which the courts may properly substitute their judgment for that of the agency.²³

In an interesting decision handed down during the survey period, Oak Cliff Savings and Loan Association made application to open a branch office in Fort Worth. After notice and hearing, the Commissioner denied the application on the basis that there was "no public need" and that the area for the proposed branch was being adequately served by existing savings and loan associations. Oak Cliff Savings filed suit for judicial review of the Commissioner's ruling, contending that the Commissioner had improperly relied on a 1963 rule of the Building and Loan Section of the Texas Finance Commission to the effect that no branch office would be permitted in another county unless that county had no existing association providing the necessary service.²⁴ Oak Cliff Savings maintained that this rule was void because the agency had exceeded its statutory authority in promulgating the rule.²⁵ The trial court reversed the Commissioner's ruling and the

²³ See 2 F. COOPER, *STATE ADMINISTRATIVE LAW* 665-67, 706-22 (1965).

²⁴ RULES AND REGULATIONS FOR SAVINGS AND LOAN ASSOCIATIONS, PROMULGATED BY THE SAVINGS AND LOAN SECTION OF THE FINANCE COMMISSION AND THE SAVINGS AND LOAN COMMISSIONER OF TEXAS § 2.4 (1968) provides:

The Commissioner shall approve an application for a branch office if he shall have affirmatively found from the data furnished with the application, the evidence adduced at the hearing and his official records that:

(f) the proposed location of the additional office is within the same county as the principal or home office of the applying association except in cases where it appears that the proposed additional office is to be in a different county from that in which the principal or home office of the applying association is located and there is no other association, either State or Federal, adequately serving the community in which such additional office is to be located.

This rule is sometimes referred to as the "County Line Rule."

Rule 2.4(f) was amended Aug. 5, 1969, by the Finance Commission of Texas and the Savings and Loan Commissioner. It now provides:

(f) the proposed location of the additional office is within the same standard metropolitan statistical area (as defined by the United States Bureau of Census) as the principal or home office of the applying association except in cases where it appears that the proposed additional office is to be in a different county or standard metropolitan statistical area, as the case may be, from that in which the principal or home office of the applying association is located, and there is no other association, either State or Federal, adequately serving the community in which such additional office is to be located.

²⁵ To be more specific, Oak Cliff Savings contended that the application for the branch office was controlled by TEX. REV. CIV. STAT. ANN. art. 852(a), § 2.08 (1964), which provides:

The Commissioner shall not approve any charter application unless he shall have affirmatively found from the data furnished with the application, the evidence adduced at such hearing and his official records that:

(1) the prerequisites, where applicable, set forth in Sections 2.02, 2.03, 2.04, 2.05, and 2.06 have been complied with and that the Articles of incorporation comply with all other provisions of this Act;

(2) the character, responsibility and general fitness of the persons named in the Articles of incorporation are such as to command confidence and warrant belief that the business of the proposed association will be honestly and efficiently conducted in accordance with the intent and purpose of this Act and that the proposed association will have qualified fulltime management;

(3) there is a public need for the proposed association and the volume of business in the community in which the proposed association will conduct its business is such as to indicate profitable operation;

(4) the operation of the proposed association will not unduly harm any existing association.

Oak Cliff argued that rule 2.4(f) added a more onerous burden for the establishment of branch

Austin court of civil appeals affirmed; however, the Supreme Court of Texas reversed holding that the rule was in complete harmony with the provisions of the Savings and Loan Act.²⁶

The supreme court first considered the scope of the rulemaking authority of the Building and Loan Section of the Texas Finance Commission. The court pointed out that it was not the intent of the legislature to require the Building and Loan Section to operate in a "strait jacket" in exercising its rule-making powers granted under state law.²⁷ In exercising the powers and the broad authority granted by the legislature, naturally all rules and regulations must comply with the constitution and legislative enactments of this state. However, the determining factor is whether the rule is in harmony with the general objectives of the particular Act involved. The supreme court concluded that the rule was in harmony with the provisions of the Savings and Loan Act. The court observed that the legislature has not specified the requirements for a branch office; however, emphasis was placed on one section of article 852(a) which clearly provides that no branch office can be established without the prior approval of the Commissioner.²⁸ Thus, a situation exists where the legislature left considerable discretion to the agency. The court concluded that in exercising this discretion, the Building and Loan Section was well within the framework of its delegated authority.²⁹

In another decision involving statutory interpretation, the Austin court of civil appeals held that a member of a country club operating under the "locker system" may authorize an agent to purchase liquor for him in a wet county and transport it to his locker in a dry county where possession by the member is legal. Policy determinations by the Texas Liquor Control Board to the contrary were held to be beyond the scope of the agency's statutory authority.³⁰

offices in counties other than the county of domicile of the home office of the applying association, and thus the rule ran counter to the above statutory requirements.

²⁶ Gerst v. Oak Cliff Sav. & Loan Ass'n, 421 S.W.2d 449 (Tex. Civ. App.—Austin 1967), *rev'd*, 432 S.W.2d 702 (Tex. 1968).

²⁷ The rule-making authority of the agency is governed by TEX. REV. CIV. STAT. ANN. art. 342-114 (1959), which provides in part:

The Building and Loan Section, through resolution adopted by not less than two affirmative votes, may promulgate general rules and regulations not inconsistent with the Constitution and Statutes of this State, and from time to time amend the same, which rules and regulations shall be applicable alike to all State associations

It is also governed by *id.* art. 852(a), § 5.04 (1964), which provides in part:

The Commissioner and the Building and Loan Section of the Finance Commission, acting pursuant to the rule-making power delegated by House Bill No. 91, Chapter 198, Acts of the Fifty-seventh Legislature, Regular Session, 1961, as the same may be amended shall, from time to time, promulgate such rules and regulations in respect to loans by associations operating under this law as may be reasonably necessary

²⁸ *Id.* art. 852(a), § 2.13, provides:

No association shall, without the prior approval of the Commissioner (i) establish any office other than the principal office stated in its articles of incorporation, (ii) move any office of the association from its immediate vicinity or (iii) change its name. When his approval is applied for, the Commissioner shall give any person who might be affected an opportunity to be heard on the action proposed to be taken for which approval is sought.

²⁹ For an excellent discussion of the tests applied in determining the validity of administrative rules and whether they exceed the authority conferred, see 1 F. COOPER, STATE ADMINISTRATIVE LAW 250-55 (1965).

³⁰ Texas Liquor Control Bd. v. Canyon Creek Land Corp., 443 S.W.2d 308 (Tex. Civ. App.—Austin 1969), *error granted*.

In this case, Canyon Creek Land Corporation operated a country club in a "dry" area, holding a valid private club permit issued by the Texas Liquor Control Board. Members of the club stored alcoholic beverages at the club for their consumption under the "locker system."³¹ The members of the club purchased their beverages in wet areas of the state and transported them to their lockers at the club through an *agent*, usually the club manager, who had been authorized to do so in writing by each purchasing member. The club asserted, in this action against the Texas Liquor Control Board, that the Board had taken the position that the practice is illegal and had implemented its position by charging the club with a violation of the law because of such practice. It should be noted that the Board's position was merely a policy determination and did not purport to take the form of a written rule. The trial court granted the club's request for an injunction and concluded that the policy pursued by the Board was illegal.

In affirming the decision of the trial court, the Austin court of civil appeals determined that the basic question of legality of the "locker system" turned upon an interpretation of various provisions of the Liquor Control Act. Section (1) of article 666-23 (a) authorizes any person who purchases liquor for his consumption to transport the liquor from the place where it is purchased to a place where the possession is legal.³² Article 666-3 (a) (6) defines a "person" among other things as an "agent."³³

The Board contended that since the specific statute authorizing the "locker system" did not mention the word person, but only an "individual," the club could not rely upon the "agent" definition of a person specified in article 666-3 (a) (6). The court of civil appeals held this contention to be frivolous, since it is common knowledge that an individual is in fact a person. The court concluded that the policy pursued by the Board was in derogation of its statutory authority and thus was illegal.³⁴

In a recent case before the Beaumont court of civil appeals,³⁵ the Texas Employment Commission contended that two individuals (Holberg and Smith) were ineligible for benefits under the Unemployment Compensation Act³⁶ because of various restrictions they had placed upon their availability for future employment. In the case of Holberg, the Commission also contended that he had disqualified himself under the Act by volun-

³¹ TEX. PEN. CODE ANN. art. 666-15 (e), § 1 (b) (Supp. 1969) authorizes the "locker system" in Texas. It provides:

'Locker System' shall mean that system of alcoholic beverages storage whereby the club rents to its members lockers wherein the member may store alcoholic beverages for consumption by himself or his guests. All such alcoholic beverages so stored under the 'locker system' shall be purchased and owned by the member as an individual.

³² *Id.* art. 666-23a(1) (1952) provides: "It is provided that any person who purchases alcoholic beverages for his own consumption may transport same from a place where the sale thereof is legal to a place where the possession thereof is legal."

³³ *Id.* art. 666-3 (a) (6) (1952) provides: "'Person' shall mean and refer to any natural person or association of natural persons, trustee, receiver, partnership, corporation, organization, or the manager, agent, servant, or employee of any of them."

³⁴ See also *Texas Liquor Control Bd. v. Bacon*, 443 S.W.2d 312 (Tex. Civ. App.—Austin 1969), *error granted*, a companion case with substantially the same holding.

³⁵ *Texas Employment Comm'n v. Holberg*, 434 S.W.2d 733 (Tex. Civ. App.—Beaumont 1968), *aff'd in part and rev'd in part*, 440 S.W.2d 38 (Tex. 1969).

³⁶ TEX. REV. CIV. STAT. ANN. art. 5221b-1 (1962).

tarily leaving his last employment without good cause. The Texas Employment Commission had ruled in both instances that the applicants were ineligible for benefits, and when the district court ruled in favor of claimants, the Commission appealed.

The court of civil appeals first concluded that the determination of the agency must be reviewed on the basis of the substantial evidence rule. After reviewing the evidence as presented in the district court,³⁷ the court concluded that the order of the Commission as to Holberg was not reasonably supported by substantial evidence, but sufficient evidence did exist to deny benefits to Smith. In arriving at this conclusion, the court concluded that the first statute in question³⁸ did not disqualify one from benefits because he had retired at the suggestion of his employer. Thus, retirement for the benefit of both the employer and employee was not "voluntary" within the meaning of the statute. Concerning the second statute in question,³⁹ the court decided that a person was still available for work within the meaning of the legislation, even though he restricted his future employment to his usual occupation at prevailing wages. However, where the person applying for benefits refused to travel more than five miles from his home and to perform shift work, he is not available under the provision.

While the reader may have no particular objection to the outcome of the case, it would appear that the court has misconstrued the function of the substantial evidence rule. Professor Davis, in his treatise,⁴⁰ makes it clear that while the scope of judicial review of administrative orders can range from zero to one hundred per cent (complete unreviewability to complete substitution of judicial judgment on all questions), the tendency has been towards a middle ground known as substantial evidence. Under this concept the court may substitute its judgment entirely on questions of law, but limits itself to the test of reasonableness in reviewing fact findings.⁴¹ The decision under discussion is obviously concerned with statutory interpretation, a clear question of law. The court could simply have con-

³⁷ The facts may be briefly summarized as follows: Holberg was sixty-nine years of age, he had been a machinist for fifty-two years, and had worked for American Bridge Division of United States Steel for fifteen years prior to his retirement. It appears that his retirement was not entirely voluntary within the accepted definition of the term. His foreman had on several occasions asked him if he was not interested in retiring and when applicant appeared to show no interest he was instructed to discuss the matter with the plant personnel supervisor and the payroll officer who appeared to be in charge of the retirement program. Holbert then "got the message," and retired. He filed a claim for unemployment compensation in November 1965, at which time he said he was ready, willing and able to work. His application for compensation restricted his service to machinist work at the prevailing wage.

Smith was likewise a sixty-nine-year-old machinist who had been in the employ of American Bridge Division for fifteen or sixteen years at the time of his retirement. At the time of his application for benefits he restricted future employment to within five miles of his home and said that he would not accept shift work.

³⁸ TEX. REV. CIV. STAT. ANN. art. 5221b-3 (1962) provides: "An individual shall be disqualified for benefits: (a) If the Commission finds that he has left his last work voluntarily without good cause connected with his work."

³⁹ *Id.* art. 5221b-2 (1962) provides: "An unemployed individual shall be eligible to receive benefits with respect to any benefit period only if the Commission finds that: . . . (d) He is available for work."

⁴⁰ 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.01 (1958). The concept of substantial evidence is discussed more fully at notes 43-54 *infra*.

⁴¹ See *McFarland v. Texas Liquor Control Bd.*, 434 S.W.2d 924 (Tex. Civ. App.—Waco 1968), for a recent restatement of the rule.

cluded, on the basis of the facts of the case, that the agency had misinterpreted the statute.⁴²

The Substantial Evidence Rule. As noted above, the substantial evidence rule, properly applied, is concerned only with questions of fact, as opposed to questions of law. Perhaps the classic definition of substantial evidence is derived from *Universal Camera v. National Labor Relations Board*.⁴³ There the United States Supreme Court stated:

Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. . . . The Board's findings are entitled to respect; *but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.*⁴⁴

In *Railroad Commission v. Shell Oil Co.*⁴⁵ the Supreme Court of Texas attempted to specify the type of evidence that would reasonably support an administrative order by stating:

This does not mean a mere scintilla of evidence will suffice, nor does it mean that the court is bound to select the testimony of one side, with absolute blindness to that introduced by the other. After all, the court is to render justice in the case. The record is to be considered as a whole, and it is for the court to determine what constitutes substantial evidence. The court is not to substitute its discretion for that committed to the agency by the Legislature, but is to sustain the agency if it is reasonably supported by substantial evidence before the court.⁴⁶

In Texas the substantial evidence rule is based upon a trial de novo in the district court. This concept had its inception in *Shupee v. Railroad Commission*.⁴⁷ Under the Texas rule the litigant is required to try the case first before the agency and a second time before the district court. Based upon the record prepared before the district court, the appellate judge is to determine, as a matter of law, whether or not there is reasonable evi-

⁴² According to Professor Cooper there are few issues, if any, involving statutory interpretation in unemployment compensation cases, which are not considered appropriate for judicial review. To some extent this is due to the fact that unemployment compensation legislation is of comparatively recent origin. There being no established legal standards to guide the agencies in their administration of the many legal concepts introduced by unemployment insurance laws, the courts consider it appropriate to consider a wide variety of questions concerning the application of the statutes in order to furnish adequate directives for the administrative tribunal to follow. 2 F. COOPER, STATE ADMINISTRATIVE LAW 716-18 (1965).

Holberg was subsequently reversed in part and affirmed in part by the supreme court on an entirely different basis. *Texas Employment Comm'n v. Holberg*, 440 S.W.2d 38 (Tex. 1969). The problem as viewed by the court there turned upon the question of whether one was "available for work" by merely registering with the Commission and reporting for work, or whether *in addition* the registrant must conduct an independent, diligent search for other employment on his own. The court concluded the latter, holding that there was substantial evidence in the record to support the conclusion that neither applicant had made a reasonably diligent search for other work in his locality.

⁴³ 340 U.S. 474 (1951).

⁴⁴ *Id.* at 490 (emphasis added).

⁴⁵ 139 Tex. 66, 161 S.W.2d 1022 (1942).

⁴⁶ *Id.* at 1029-30.

⁴⁷ 57 S.W.2d 295 (Tex. Civ. App.—Austin 1933), *aff'd*, 123 Tex. 521, 73 S.W.2d 505 (1934); see Reavley, *Substantial Evidence and Insubstantial Review in Texas*, 23 Sw. L.J. 239 (1969).

dence in the record to support the conclusion of the administrative body.⁴⁸ The main distinction between Texas substantial evidence review and that provided in the federal courts, is that in the latter, the review is limited to the record prepared at the administrative hearing.

In Texas the record prepared before the agency is not per se admissible in the district court, rather its admissibility depends upon its own merits under the general rules of evidence.⁴⁹ Further, as noted above, the appellate court's function is not to decide whether the order is right or wrong, nor to substitute its judgment for that of the agency on issues of fact. Instead its sole function in applying the substantial evidence rule is to decide whether the evidence is such that reasonable minds could not have reached the conclusion the administrative body must have reached in order to justify its action.⁵⁰

The latter principle appears to have been ignored in a recent court of civil appeals decision.⁵¹ Air Southwest had applied to the Texas Aeronautics Commission for a Certificate of Public Convenience and Necessity authorizing it to provide scheduled commuter service between the Texas cities of Dallas, Fort Worth, Houston, and San Antonio. Various other airlines intervened in the proceeding and contested the application. At the conclusion of the hearing the Board issued a unanimous order granting the application. The contestants filed suit in a district court of Travis County to have the order set aside and to have the Commission permanently enjoined from issuing the certificate to Air Southwest. The district court complied with their request after a three-week trial which resulted in a 3000-page record.

On appeal, the court of civil appeals concerned itself primarily with the question of whether the order of the Commission was or was not reasonably supported by substantial evidence. Following a laborious examination of the testimony introduced by the applicants, and contested by the intervenors,⁵² the court concluded that the order granting the application was not reasonably supported by substantial evidence. While the court recognized that the evidence in behalf of the appellant comprised "a substantial part of this record,"⁵³ it did not deem that controlling in light of the fact that the testimony of several of the witnesses was "too vague and general to formulate evidence of a nature substantial enough to cast any doubt whatsoever on the adequacy of service presented through the testimony of the appellees."⁵⁴

⁴⁸ The one noticeable exception to the Texas substantial evidence concept is in relation to appeals from the Savings and Loan Commissioner. The supreme court has held that judicial review there is to be limited to the record prepared before the agency. See *Gerst v. Nixon*, 411 S.W.2d 350 (Tex. 1966).

⁴⁹ *Railroad Comm'n v. Shell Oil Co.*, 139 Tex. 66, 161 S.W.2d 1022 (1942). See also Walker, *The Application of the Substantial Evidence Rule in Appeals from Orders of the Railroad Commission*, 32 TEXAS L. REV. 639 (1954).

⁵⁰ *Trapp v. Shell Oil Co.*, 145 Tex. 323, 198 S.W.2d 424 (1946).

⁵¹ *Texas Aeronautics Comm'n v. Braniff Airways Inc.*, 439 S.W.2d 699 (Tex. Civ. App.—Austin 1969), error granted.

⁵² 439 S.W.2d at 702-12.

⁵³ *Id.* at 705.

⁵⁴ *Id.* at 711.

Judge O'Quinn's dissent challenged this view of the record. The Commission had heard the testimony of all the parties and had unanimously agreed that the certificate should be granted. The attacks upon Air Southwest's testimony by appellees did not completely negate the value of Air Southwest's contention, and based upon that testimony the Commission had framed its order. The fact that the testimony of Air Southwest was rebutted or contradicted did not destroy or remove it from the record. Nor does such conflict cause the testimony to be less substantial in support of the Commission's order if the Commission in the exercise of its discretion believes and accepts the evidence.

Scope of Judicial Review. The survey period produced the only reported case to date⁵⁵ concerning the scope of judicial review of disciplinary proceedings under the Public Accountancy Act of 1945.⁵⁶ Appellant, a Certified Public Accountant, was convicted in a federal court of a felony in connection with the preparation and filing of false and fraudulent income tax returns. The Public Accountancy Act of 1945 which created appellee, the Texas State Board of Public Accountancy, provides in part that when a CPA is convicted of a felony, the Board may revoke or suspend the accountant's certificate for not longer than five years, or reprimand the guilty accountant.⁵⁷ Pursuant to this Act, the Board entered its order suspending appellant's permit to practice public accountancy for a period of thirty months.

Appellant then filed suit in the district court naming appellee as defendant and asking that the order be set aside and that he be permitted to practice his profession. The Board filed a motion for summary judgment and in support thereof filed a certified copy of the felony conviction and a copy of the Board's proceedings. The district court granted the Board's motion for summary judgment and "affirmed" the Board's finding.

The appellant appealed from the action of the trial court, contending that he had been denied a trial de novo as provided for in the governing statute.⁵⁸ Appellant contended specifically that he was denied a trial on the

⁵⁵ *Hull v. Texas State Bd. of Pub. Accountancy*, 434 S.W.2d 387 (Tex. Civ. App.—Houston 1968).

⁵⁶ TEX. REV. CIV. STAT. ANN. art. 41a (1969).

⁵⁷ *Id.* § 22a provides:

After notice and hearing as provided in Section 23 of this Act, the Board may revoke or may suspend for a period not to exceed five (5) years, any certificate issued under Sections 12 or 13 of this or any prior Acts, or any registration granted under Sections 10 or 14 of this or any prior Acts, or may revoke, suspend or refuse to renew any permit issued under Sections 9 or 13 of this Act, or may reprimand the holder of any such permit for any one or more of the following causes:

.....
(5) Conviction of a felony under the laws of any state or of the United States.

⁵⁸ *Id.* § 23 (i) provides:

Any person, firm or corporation adversely affected by any order, rule or decision of the Board may file a petition in the District Court of the county of his residence in Texas, or by a nonresident of Texas in the District Court of Travis County, Texas, setting forth the particular objection to such decision, rule or order, against the Texas State Board of Public Accountancy as defendant, such petition to be filed within thirty (30) days after the date a copy of such order is sent by registered mail to such person, firm or corporation. Service of citation may be had by leaving a copy thereof at the office of the Board in Austin, Travis County, Texas. *The case shall be*

issue of the nature and extent of the disciplinary action that should be taken against him.

The court of civil appeals held that the appellant was entitled to the de novo determination upon *all* issues in the case, not only the nature and extent of the discipline to be imposed, but also his being subject to discipline in the first place. The court reasoned that the legislature had provided for a trial de novo, not a review of the Board's action. This being the case, the district court had nothing to affirm. The Board's order, when suit was filed in the district court, became a nullity. All facets of the action against appellant had to be tried anew.

While the court of civil appeals arrived at the correct conclusion, the reasoning of the opinion may be subject to question. The determination as to the appropriate scope of review should not be based simply upon the wording of the statute and the intent of the legislature. The courts in the past have had little difficulty in striking down almost identical de novo provisions⁵⁹ where they run afoul of article II, section I of the Texas Constitution.⁶⁰

The cases indicate that the validity of allowing a complete de novo review turns upon the rather subtle distinction between judicial and legislative functions, permitting it in the former but denying it in the latter.⁶¹ In distinguishing the two, *Key Western Life Ins. Co. v. State Board of Insurance*⁶² placed great emphasis upon whether the legislation in question had vested considerable discretion in the agency and whether the action of the administrative tribunal was "particular and immediate," rather than, as in the case of rule-making, "general and future in effect." If the legislation vested relatively little discretion and the action was "particular and immediate," then the function must be classified as judicial.

Applying the above principles to the *Hull* decision, it appears that the statutes vesting disciplinary power in the Texas Board of Public Accountants involved little discretion; it simply specified ten types of conduct for which one may be disciplined. The only discretion related to the nature and extent of the discipline. The action of the Commission was certainly "particular and immediate."⁶³

tried as other civil cases. The cause shall be tried and determined upon a trial de novo to the same extent as now provided for in the case of an appeal from the justice court to the county court. Either party to said action may appeal to the appellate court having jurisdiction of said cause. The Board shall not be required to give any appeal bond in any cause arising hereunder. Neither the Texas State Board of Public Accountancy nor any member thereof shall be liable to any person, firm or corporation charged or investigated by said Board, for any damages incident to such investigation, or any complaint, charge, prosecution, proceeding or trial.

(Emphasis added.)

⁵⁹ *Chemical Bank & Trust Co. v. Falkner*, 369 S.W.2d 427 (Tex. 1963); *Davis v. City of Lubbock*, 160 Tex. 38, 326 S.W.2d 699 (Tex. 1959).

⁶⁰ TEX. CONST. art. II, § 1.

⁶¹ See Reavley, *Substantial Evidence and Insubstantial Review in Texas*, 23 Sw. L.J. 239, 249 (1969).

⁶² 163 Tex. 11, 22, 350 S.W.2d 839, 847 (1961).

⁶³ For an excellent discussion of some of the inherent problems in attempting to distinguish legislative from judicial functions, see 4 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 29.10 (1968).